not represent any principle peculiar to charitable corporations; but as a general doctrine of agency it appears to be based on a totally fictitious presumption and unsupported by any sound policy.[17] It is but another example of the tendency exhibited by courts holding the second view, to engraft exceptions upon the principle of *respondeat superior*. This view, however, suggests a fifth possibility, namely, that charitable corporations should be exempt from all tort liability to beneficiaries. The policy in favor of such a rule would be the one discussed above in connection with absolute immunity; and the objections there urged would be less strong here. Since there is in this country a general recognition of some immunity, this delimitation of it would appear least undesirable.

LIABILITY OF RAILROAD RIGHT OF WAY FOR LOCAL ASSESSMENTS. — The liability of a railroad right of way for local assessments is a matter upon which the authorities are not always clear. In accord with the weight of authority[1] is a recent case in Missouri, in which the right of way was held to be subject to an assessment for street improvements. *Gilsonite Construction Co.* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 144 S. W. 1086. The contrary result in a number of cases[2] and the failure of the courts to give the exact basis of decision has produced an apparent conflict of authority, which, on closer examination, is rather a confusion resulting from differences of local law. It is clear that a denial of liability must rest on one of two grounds: either the statute is unconstitutional; or it does not in terms include the railroad right of way in the description of property subject to assessment.

Almost all the cases which deny liability appear to have been decided on the latter ground. The frequent and misleading objection, that no property can be subject to a local assessment unless actually benefited, is referable to the fact that the statute in question usually provides in terms that only property benefited shall be assessed, and the tribunal authorized has found, as a fact, no benefit.[3] In other cases, the courts have held the words of the act, such as "lot or parcel"[4] and "owner,"[5] inapplicable to a right of way or the proprietor of a mere easement. The existence of a public policy opposed to the piecemeal sale of rail-

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[17] It relies on a far-fetched analogy to the fellow-servant rule, and seems as regrettable as that doctrine. Wallace *v.* Casey Co., *supra*, also relies upon a line of reasoning somewhat similar to that discussed above, that *respondeat superior* is based on profit, and does not apply when the principal is conferring a benefit on the injured person.

[1] Chicago, Milwaukee & St. Paul Ry. Co. *v.* City of Milwaukee, 133 N. W. 1120 (Wis.); Louisville, New Albany & Chicago Ry. Co. *v.* State, 122 Ind. 443, 24 N. E. 350. See ELLIOTT, RAILROADS, 2 ed., § 786.

[2] Southern California Ry. Co. *v.* Workman, 146 Cal. 80, 79 Pac. 586.

[3] Village of River Forest *v.* Chicago & Northwestern Ry. Co., 197 Ill. 344, 64 N. E. 364; State, etc. Co. *v.* City of Elizabeth, 37 N. J. L. 330; People *ex rel.* Davidson *v.* Gilon, 126 N. Y. 147, 27 N. E. 282.

[4] Chicago, Rock Island & Pacific Ry. Co. *v.* City of Ottumwa, 112 Ia. 300, 83 N. W. 1074.

[5] City of Muscatine *v.* Chicago, Rock Island & Pacific Ry. Co., 88 Ia. 291, 55 N. W. 100.

roads,[6] or any sale whatsoever of the right of way,[7] has often led to such a strict construction of the statute that the property in question was excluded from its operation. In all these cases, the court decided a purely local question and left the general principle untouched.

In a few cases where the statute clearly applied to the right of way, the power to levy such assessments has been the subject of decision, and almost uniformly sustained as constitutional.[8] A consideration of the principles underlying the power to levy special assessments adds further weight to the authority of these cases. It is a branch of the taxing power vested in the sovereign, and differs from a real tax only in the method of apportionment. Although in its general theory it presupposes peculiar benefits to the property assessed, the manner of exercise is *primâ facie* a legislative concern. Only an approximate correspondence between benefits and burden can be attained, and the subsequent fact of no benefit will not invalidate an act which is based on a reasonable presumption of benefits to the property affected.[9] Only when the statute includes within its scope property which in no possible event could be benefited, will the judiciary feel called upon to declare that the legislature has exceeded its power.[10] It cannot be maintained that a railroad right of way is incapable of deriving advantage from a local improvement. Where the railroad is owner of the fee, the possibility of future benefits is sufficient to support the assessment. No property is exempt from this duty by reason of the existing user.[11] And where the railroad owns only a so-called easement, the situation is the same;[12] for this qualified proprietorship of less than the fee is, nevertheless, a right to the exclusive use of the surface for any purpose germane to the proper transaction of the business.[13] Hence an improvement may always be capa-

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[6] Chicago, Milwaukee & St. Paul Ry. Co. *v.* City of Milwaukee, 89 Wis. 506, 62 N. W. 417. This is only a rule of policy and can be changed by express act of the legislature. Chicago, Milwaukee & St. Paul Ry. Co. *v.* City of Janesville, 137 Wis. 7, 118 N. W. 182; Ban *v.* Columbia Southern Ry. Co., 117 Fed. 21.

[7] City of Boston *v.* Boston & Albany R. Co., 170 Mass. 95, 49 N. E. 95. This, too, appears to be no more than a rule of public policy, not a restriction on legislative power. See GRAY, LIMITATIONS OF TAXING POWER, § 1919.

[8] Heman Construction Co. *v.* Wabash R. Co., 206 Mo. 172, 104 S. W. 67; Louisville & Nashville R. Co. *v.* Barber Asphalt Paving Co., 197 U. S. 430, 25 Sup. Ct. 466. *Contra*, Allegheny City *v.* Western Pennsylvania R. Co., 138 Pa. St. 375, 21 Atl. 763.

[9] French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. 625; Louisville & Nashville R. Co. *v.* Barber Asphalt Paving Co., *supra*; Spencer *v.* Merchant, 125 U. S. 345, 8 Sup. Ct. 921.

[10] Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187; Sears *v.* Street Commissioners of Boston, 173 Mass. 350, 53 N. E. 876.

[11] See cases *supra*, note 9.

[12] Northern Pacific Ry. Co. *v.* City of Seattle, 46 Wash. 674, 91 Pac. 244.

[13] Elyton Land Co. *v.* South & North Alabama R. Co., 95 Ala. 631, 10 So. 270; Hollingsworth *v.* Des Moines & St. Louis R. Co., 63 Ia. 443, 19 N. W. 325. "The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad, which is usually a permanent improvement, a perpetual highway of travel and commerce. . . . The exclusive use of the surface is acquired, and damages assessed on the theory that the easement will be perpetual; so that ordinarily the fee is of little or no value." Smith *v.* Hall, 103 Ia. 95, 96, 72 N. W. 427, 428. This is rather an "interest in the land" than an easement. See Boyce *v.* Missouri Pacific R. Co., 168 Mo. 583, 590, 68 S. W. 920, 922; Kansas Central Ry. Co. *v.* Allen, 22 Kan. 285, 293; ELLIOTT, RAILROADS, 2 ed., § 938.

ble of enhancing the value of the right of way,[14] and local assessments on such property would seem to be well within the constitutional limits of legislative power.

RECOVERY OF MONEY LOANED TO PERSON HAVING NO LEGAL CAPACITY TO CONTRACT. — By the early English law, a person lending money to another who was under a disability had no legal remedy.[1] But in equity the fiction developed that if money was advanced to an infant,[2] an unsupported wife,[3] or a lunatic,[4] and was in fact spent for necessaries, the lender occupied the place of the tradesman who supplied them.[5] This theory of "subrogation" was recognized by text writers [6] and was applied in several decisions in this country.[7] It was even expanded to cover the analogous case of corporations borrowing *ultra vires* and expending the proceeds in paying their legal liabilities.[8] But lately the theory has fallen into disrepute,[9] and in England its application to corporations borrowing *ultra vires* has been flatly denied.[10] It seems strange, therefore, that a recent English decision in a case in which the lender sought to recover money advanced to a lunatic and used for necessaries should have not only adopted the theory but carried it to its logical extreme. *In re Beavan*, [1912] 1 Ch. 196.[11] Although the lending bank was denied all compensation for its services, yet it was actually permitted to recover

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[14] Chatham County Commissioners *v.* Seaboard Air Line Ry. Co., 133 N. C. 216, 45 S. E. 566 (stock law). In State, Paterson & Hudson River R. Co. *v.* City of Passaic, 54 N. J. L. 340, 23 Atl. 945, it was found as a fact that the easement was benefited by a sewer. *Contra*, Allegheny City *v.* Western Pennsylvania R. Co., *supra*.

[1] Darby *v.* Baucher, 1 Salk. 278; Earle *v.* Peale, 1 Salk. 386.

[2] Marlow *v.* Pitfeild, 1 P. Wms. 558.

[3] Harris *v.* Lee, 1 P. Wms. 482; Jenner *v.* Morris, 3 De G., F. & J. 45; Deare *v.* Souter, L. R. 9 Eq. 151.

[4] Williams *v.* Wentworth, 5 Beav. 325; Wentworth *v.* Tubb, 1 Y. & C. Ch. 171.

[5] It would seem that this doctrine of subrogation has not been applied in favor of one who has loaned money to a drunkard; but a recovery in quasi contracts of so much of the loan as has been spent for necessaries is permitted. Haneklan *v.* Felchlin, 57 Mo. App. 602. See Gore *v.* Gibson, 13 M. & W. 623, 626; McCrillis *v.* Bartlett, 8 N. H. 569, 572.

[6] 3 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1300; SHELDON, SUBROGATION, 2 ed., 365.

[7] Kenyon *v.* Farris, 47 Conn. 510. See Walker *v.* Simpson, 7 Watts & S. (Pa.) 83. *Cf.* Leuppie *v.* Osborn, 52 N. J. Eq. 637, 29 Atl. 433.

[8] *In re* Cork, etc. Ry. Co., L. R. 4 Ch. 748; Blackburn Building Society *v.* Cunliffe, Brooks & Co., 22 Ch. D. 61; Wells *v.* Town of Salina, 71 Hun (N. Y.) 559, 25 N. Y. Supp. 134.

[9] See *In re* Rhodes, 44 Ch. D. 94, 105, 107. In De Brauwere *v.* De Brauwere, 203 N. Y. 460, 96 N. E. 722, the subrogation theory adopted by the court below, 69 N. Y. Misc. 472, 126 N. Y. Supp. 221, was expressly rejected and the same decision reached on quasi-contractual grounds. See 24 HARV. L. REV. 306; 25 HARV. L. REV. 473. In Skinner *v.* Tirrel, 159 Mass. 474, 34 N. E. 692, the theory was repudiated and the lender denied all relief. But the case may, perhaps, be distinguished on the ground that the loan was made to the wife on her own credit.

[10] *In re* Wrexham, etc. R. Co., [1899] 1 Ch. 440.

[11] It is interesting to note that Neville, J., who decided this case, advocated as counsel the application of the subrogation doctrine to corporations borrowing *ultra vires* in the case of *In re* Wrexham, etc. R. Co., *supra*.